IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.956 OF 2002

Kirtilal K. Shah, Proprietor,
M/s. Kamal Industries ..Petitioner.
Vs.
Union of India & Ors. ..
Respondents.

....

Mr. S.K. Talsania with Mr. Mahesh Londhe i/b M/s. Sanjay Udeshi & Co. for the petitioner.

**CORAM : DR.D.Y.CHANDRACHUD, J.**

**12th** January, 2005.

P.C. :

1. The Petitioner has stated in these proceedings under Article 226 that he was carrying on the business of manufacturing plastic items from Gala No.5, Anuj Plastic Industrial Estate Building, 121-122, S.V. Road, Dahisar (East), Mumbai. According to the Petitioner the business was closed down in 1992, since he had to undergo a heart by-pass operation. Thereafter the Petitioner settled down at Dhanaj in the State of Gujarat. According to the

Petitioner at no point of time in his employment did he have more than six employees. On 1st May, 1992, the Petitioner is alleged to have given out the premises on leave and licence basis to one Bhimjibhai Meramanbhai Vasara, the Fourth Respondent and the licence was thereafter renewed on 1st March, 1994. The premises were eventually sold by the Petitioner on 30th October, 1999. The Fourth Respondent had during the term of the licence carried on the business of cutting and polishing diamonds.

2. The Regional Provident Fund Commissioner initiated proceedings under Section 7-A of the Employees' Provident Fund and Miscellaneous Provisions Act, 1952. Summons in the inquiry were issued in the name of Kamal Industries. By a letter dated 15th April, 1999, the Petitioner responded to the notice stating that it was only during the period 1985 to 1992 that he had carried on the business of household appliances in his establishment; that the said business was closed down in 1992 after which the premises were leased out and that even during the period when the business was carried on, the total number of employees never exceeded

the threshold requirement of 20 as specified in the Act. On 30th June, 1999 an inquiry took place before the Regional Provident Fund Commissioner at which the Fourth Respondent was present. He appears not to have attended the proceedings thereafter. By a further letter dated 14th July, 1999 the Petitioner sought an extension of time to produce documents and on 29th September, 1999 a communication was addressed by the Petitioner producing therewith the Balance Sheets and Profit and Loss Account for the financial years covering the period from 1987 to 1993. The Petitioner also enclosed photocopies of the wage register and muster rolls in order to establish that at no point of time had he employed more than six persons. On 30th September, 1999, the Petitioner was represented before the Regional Provident Fund Commissioner and the minutes of those proceedings record the submission of Balance Sheets, Profit and Loss Accounts and photocopies of the wage register and muster roll. The minutes further record that the licence in the name of the Fourth Respondent issued by the Municipal Corporation was in the name of the same firm as the firm of the Petitioner viz. Kamal Industries

and that therefore, there appeared to be a continuity of business. Summons was directed to be issued to the Fourth Respondent.

3. The Petitioner has stated before the Court that on 7th January, 2000, the proceedings before the Regional Provident Fund Commissioner were adjourned to 17th February, 2000, the Petitioner having remained absent on the date of hearing. By a letter dated 21st March, 2000, the Petitioner's authorized representative wrote to the Regional Provident Fund Commissioner recording that the letter of intimation dated 1st February, 2000 has been posted only on 14th March, 2000 which was much after the date of hearing of 17th February, 2000. Hence, it was stated that the Petitioner was unable to attend and that a fresh date may be fixed. The matter, in the meantime, appears to have been fixed for hearing on 7th and 27th April, 2000. Again on 8th May, 2000, the Petitioner' sadvocate addressed a letter to the Regional Provident Fund Commissioner recording that the notice dated 10th April, 2000 was received only on 2nd May, 2000 as a result whereof it was impossible to attend the hearing. On 27th April, 2000 the matter

was placed for orders.

4. The Regional Provident Fund Commissioner passed an order on 12th May, 2000 directing the recovery of an amount of Rs.29,74,346/-. An application was filed on 12th July, 2000 on behalf of the Petitioner reiterating the replies that has already been filed before the Regional Provident Fund Commissioner in support of the contention that at no stage had the Petitioner had employed more than 20 workers, and setting out the circumstances in which the advocate for the Petitioner could not appear in view of the notice of hearing having been received belatedly. This application was dismissed by the Regional Provident Fund Commissioner on 31st August, 2000, holding that it was barred by limitation. The Regional Provident Fund Commissioner seems to have proceeded on the basis that under paragraph 79-A of the Employees' Provident Fund Scheme, 1952 a review should have been submitted within 45 days of the making of the order. A recovery certificate was issued on 8th March, 2002 in the amount of Rs.29,87,146/- following which a notice to show case was issued

on 27th March, 2000 calling upon the Petitioner to show cause as to why he should not be arrested and committed to civil prison in execution of the recovery certificate.

5. In these proceedings which were instituted before the Court on 28th March, 2002, the original order dated 12th May, 2000 of the Regional Provident Fund Commissioner, the order dated 31st August, 2000 declining to entertain the application for setting aside the ex parte order as well as the notice to show cause dated 8th March, 2002 have been called into question.

6. Counsel appearing on behalf of the Petitioner has submitted that the conduct of the Petitioner would show that there was no attempt to evade the proceedings before the Regional Provident Fund Commissioner. On the contrary, replies have been filed by the Petitioner elaborating that the business which has been conducted by the Petitioner since 1985 was closed down in 1992; that at no stage had the threshold requirement of 20 employees been crossed and the wage registers, Balance Sheets and Profit &

Loss Accounts for the relevant period were produced. None of these documents or the replies were considered in the order dated 12th August, 2000. Moreover, the order passed by the Regional Provident Fund Commissioner declining to accede to the plea of restoration proceeded on the erroneous basis that the period of limitation was 45 days when, under Section 7(4) the limitation for moving the Commissioner against an ex parte order is of three months.

7. Counsel for the Respondent is absent at the hearing. Counsel appearing on behalf of the Petitioner states that rule has been served on Respondent Nos.1, 2 and 3, who are the contesting parties and undertakes to file an affidavit of service within a period of one week from today.

8. A perusal of the record, a gist of which is extracted herein above, shows that the Petitioner had filed replies before the Regional Provident Fund Commissioner contending that the business which was being conducted by him was closed down in

1992. The Petitioner further stated that at no stage had he employed more than six employees. The relevant record was produced before the Regional Provident Fund Commissioner, as is evident from the minutes of the meeting held on 30th September, 1999(Exh.F). The letters of the Petitioner' sadvocate dated 21st March, 2000 and 8th May, 2000 (Exhibits H and J) made a grievance of the fact that the notice which was sent for the hearing before the Regional Provident Fund Commissioner was in the first case posted after the date of hearing and in the second was received on 2nd May, 2000, again after the date of hearing. The Regional Provident Fund Commissioner has evidently not considered either of these two letters before he set down the matter for an ex parte order on 27th April, 2000. Again the order dated 12th May, 2000 does not consider the replies of the Petitioner or the documentary evidence that was produced. The Petitioner then moved an application for restoration. The period of limitation for such an application under Section 7(4) of the Act is 90 days. The Regional Provident Fund Commissioner erroneously proceeded on the basis that this was an application for review and

therefore, subject to a limitation of 45 days. The recovery certificate and notice to show cause have been issued in pursuance to these orders which are basically flawed.

9. In that view of the matter, I am of the view that the appropriate order would be to quash and set aside the orders of the Regional Provident Fund Commissioner dated 12th May, 2000 and 31st August, 2000. Ordered accordingly. Consequently, the recovery certificate dated 8th March, 2002 and the notice to show cause dated 27th March, 2002 shall also be quashed and set aside. The proceedings under Section 7-A shall stand restored to the file of the Regional Provident Fund Commissioner. The Petitioner is directed to appear before the Regional Provident Fund Commissioner on 14th February, 2005, either himself or through an authorized representative, at 11 a.m. for directions in regard to the further hearing of the matter. The Petitioner shall co-operate in all respects with the time schedule that may be laid down by the Regional Provident Fund Commissioner so as to ensure an early disposal of the proceedings.

10. Before concluding, it would be necessary to record that this Court has expressed no opinion on the merits or tenability of the proceedings or upon the defence that has been sought to be raised by the Petitioner on merits.

The Petition is accordingly disposed of. No costs.